IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:19-cv-1920

WILDEARTH GUARDIANS, HIGH COUNTRY CONSERVATION ADVOCATES, CENTER FOR BIOLOGICAL DIVERSITY, SIERRA CLUB, and WILDERNESS WORKSHOP,

Petitioners,

v.

DAVID L. BERNHARDT, Secretary, United States Department of the Interior, UNITED STATES OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT, JOSEPH R. BALASH, Assistant Secretary, Land and Minerals Management, United States Department of the Interior, GLENDA H. OWENS, Acting Director of the United States Office of Surface Mining Reclamation and Enforcement, DAVID BERRY, Regional Director, Western Region Office of the Office of Surface Mining Reclamation and Enforcement,

Federal Respondents,

and

MOUNTAIN COAL COMPANY, LLC,

Intervenor-Respondents.

FEDERAL RESPONDENTS' OPPOSITION TO PETITIONERS' OPENING BRIEF ON THE MERITS

INTRODUCTION

For the fourth time in ten years, Petitioner WildEarth Guardians, joined by other conservation groups, asks this Court to halt coal mining operations on National Forest System ("NFS") lands in the North Fork Valley of western Colorado. In the first and third challenges, each alleging violations of the National Environmental Policy Act ("NEPA"), the Court rejected petitioners' varied reasons why the Department of the Interior, the Department of Agriculture ("USDA"), or the United States Forest Service ("Service") allegedly erred in their administrative proceedings. In the second challenge, *High Country Conservation Advocates v. United States Forest Service*, 52 F. Supp. 3d 1174 (D. Colo. 2014) ("*West Elk 2*"), the Court rejected two claims of error, while granting relief in the form of vacatur based on four NEPA violations.

The violations found in *West Elk 2* in 2014 were later corrected through the completion, in 2017, of two supplemental NEPA analyses, spearheaded by the USDA and the Service. Interior's Bureau of Land Management ("BLM") and Office of Surface Mining Reclamation and Enforcement ("OSMRE") participated in these proceedings as cooperating agencies (and by doing so embraced the resulting analyses as their own). The Court sustained the corrective NEPA analyses just thirteen months ago in *High Country Conservation Advocates et al. v. United States Forest Service*, 333 F. Supp. 3d 1107 (D. Colo. 2018) ("*West Elk 3*") *appeal docketed*, No. 18-1374 (10th Cir. Sept. 11, 2018), and Petitioners appealed. Oral argument before the Tenth Circuit is set for September 26, 2019.

Now, with on-the-ground operations at the West Elk Mine proceeding under the two legal authorizations required post-leasing – that is, (i) a mining permit revision, as approved by the State of Colorado in September 2018, and (ii) a mining plan modification, as approved by the Assistant Secretary of the Interior in March 2019 – WildEarth Guardians and the four other *West Elk 3* petitioners again demand vacatur. In their opening merits brief, ECF No. 26 ("Mem."), Petitioners assail the supporting NEPA analysis – that is, the analysis sustained in *West Elk 3* – by asserting claims that either were or could have been raised in *West Elk 3*. In addition, they insist on consideration of alternatives that do not achieve project purposes and that would contravene terms of the coal lease modifications, now in full effect. Petitioners' claims should be rejected because they are precluded, waived, or lack merit, as explained herein.

LEGAL BACKGROUND

1. National Environmental Policy Act

NEPA is a procedural statute that does not impose substantive results. Instead it ensures that federal agencies consider environmental consequences of major federal actions significantly affecting the environment. 42 U.S.C. §§ 4321, 4332; 40 C.F.R. § 1501.1 (2018). This consideration serves NEPA's dual purpose of informing agency decision makers of the environmental effects of proposed actions and ensuring that relevant information is made available to the public so that it "may also play a role in both the decisionmaking process and the implementation of that decision." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

To assist in meeting these goals, NEPA requires preparation of an EIS for "major Federal actions significantly affecting the quality of the human environment . . . ." 42 U.S.C. § 4332 (2)(C); 40 C.F.R. § 1502.3 (2018). The EIS must examine, among other things, the direct effects, indirect effects, and cumulative impacts of a proposed decision. 40 C.F.R. § 1502.16; *see also* 40 C.F.R. § 1508.7 (2018) (defining cumulative impact), § 1508.8 (2018) (defining effects). In addition, it must consider "alternatives to the proposed action." 42 U.S.C. § 4332 (2)(C)(iii).

NEPA regulations refine the alternatives requirement by directing agencies to "[r]igorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. § 1502.14; *see also New Mexico ex rel. Richardson, v. Bureau of Land Mgmt.*, 565 F.3d 683, 703 (10th Cir. 2009) (same). An agency need not examine alternatives that do not accomplish the purpose or objective of a proposed action, as such alternatives are "not reasonable." *Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1244 (10th Cir. 2011) (citation and internal quotation marks omitted). Where, as here, the action is "triggered by a proposal or application from a private party," the agency may give "substantial weight to the goals and objectives of that private actor." *Citizens Comm. to Save Our Canyons v. U.S. Forest Serv.*, 297 F.3d 1012, 1030 (10th Cir. 2002).

2. Mineral Leasing Act of 1920

BLM regulates and manages coal leases on federal lands under the Mineral Leasing Act, 30 U.S.C. §§ 181-287. The Act provides for development of oil and gas resources as well as solid minerals, including coal. *See* 30 U.S.C. §§ 181 (generally), 201 (coal), 226 (oil and gas). As the Tenth Circuit explained, the Act, as amended, states a

policy of making "public lands . . . available for mineral leasing in an effort to reduce our energy dependence on foreign sources and to protect our national security." *Park Cty. Res. Council, Inc. v. U.S. Dep't of Agric.*, 817 F.2d 609, 620 (10th Cir. 1987), *overruled on other grounds by Vill. of Los Ranchos De Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992) (en banc).

Before leasing mineral resources beneath NFS lands, BLM must obtain consent from the Service, which manages the surface estate. *See* 30 U.S.C. §§ 201(a)(3)(iii), 207(a); 43 C.F.R. § 3425.3(b) (2018). In providing that consent, the Service retains the authority to impose conditions to protect forest resources. *Id*. These consent procedures apply in the case of new leases and lease modifications. 43 C.F.R. § 3432.3(d).

3. Surface Mining Control and Reclamation Act of 1977

The Surface Mining Control and Reclamation Act ("SMCRA"), 30 U.S.C. §§ 1201-1328, is a "comprehensive statute designed to establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 268 (1981) (citation and internal quotation marks omitted).

SMCRA establishes a program of cooperative federalism, allowing states to administer their own regulatory programs, within limits established by federal standards and subject to oversight by Interior. *See* H.R. Rep. No. 95-218, at 57 (1977), reprinted in 1977 U.S.C.C.A.N. 593, 595; *Hodel*, 452 U.S. at 289. Under Section 503, a state may assume primary jurisdiction (or "primacy") over regulation of surface mining by submitting a program proposal to the Secretary. 30 U.S.C. § 1253. Once a state program

is approved, state law becomes operative for the regulation of surface coal mining operations within the state. *See Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275, 289 (4th Cir. 2001); *see also In re Permanent Surface Mining Regulation Litig.*, 653 F.2d 514, 518 (D.C. Cir. 1981). OSMRE is authorized to oversee the effectiveness of program implementation. *See* 30 U.S.C. § 1211.

Colorado has had primacy since 1982 and exercises its authority through its agency, the Colorado Division of Reclamation, Mining and Safety ("CDRMS"). AR17; *see also* 30 C.F.R. § 906.30 (1983) (State-Federal cooperative agreement as codified). To conduct surface mining operations, a permit from CDRMS is required. 30 U.S.C. §§ 1253, 1273. Operators must then obtain the Secretary's approval of mining plans or mining plan modifications, if federal coal is involved. *See* 30 C.F.R. § 746.11(a) (2018) (prohibiting surface mining on Federal coal lands until the Secretary has approved the mining plan."). Approval by the Secretary or Assistant Secretary is based on a recommendation from OSMRE. *Id.* § 746.13 (requiring OSMRE recommendation). Unlike the SMCRA program generally, the Secretary's authority to approve mining plans may not be delegated to the states. 30 U.S.C. § 1273(c).

FACTUAL BACKGROUND

The West Elk Mine has been in continuous operation on NFS lands in the North Fork Valley since 1981. *WildEarth Guardians v. U.S. Forest Serv.*, 828 F. Supp. 2d 1223, 1227 (D. Colo. 2011) ("*West Elk 1*"). It is located in the Paonia Ranger District of the Grand Mesa, Uncompahgre and Gunnison National Forests. *Id.* Operations at the mine were first challenged in this Court in 2010. As here, the petitioner in *West Elk 1*

contended that the Service violated NEPA in not considering an alternative requiring methane flaring. *Id.* at 1238. The Court rejected the claim. *Id.* As explained more fully below, methane flaring is costly and could affect worker safety.[1]

A. Mountain Coal's Application for Mining Plan Modifications.

While *West Elk 1* was pending, the agencies undertook consideration of a 2009 application by Intervenor-Respondent Mountain Coal Company ("Mountain Coal") to extend mining operations into a 1,700-acre area to the south of the existing mine. *See* AR39 (map depicting lease modification areas in orange and blue). The area applied for encompassed the same approximate tract and acreage that remains in dispute today, a decade later, although the acreage figure has been refined to 1,720 acres, *see* AR2 (Mining Plan Approval), based on new information and boundary adjustments. In 2012, with the Forest Service's consent, BLM approved the lease modifications, based on an environmental impact statement ("EIS") referred to in *West Elk 2* as the Lease Modification Final EIS (hereafter, "Leasing FEIS"). *West Elk 2*, 52 F. Supp. 3d at 1184.

That same year, the USDA promulgated a final rule known as Colorado Roadless Rule ("CRR"), which was supported by its own final EIS (hereafter, the "CRR FEIS"). Within Colorado, the CRR supplanted the National Roadless Rule, 66 Fed. Reg. 3244

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[1] Record evidence indicates that flaring to reduce methane emissions "has not been implemented on a widespread basis at active mines because of safety concerns." *See* AR4185 (Mar. 2016 Colorado Energy Office ("CEO") report on capture and potential use of coal mine methane). The CEO report explained that one particular concern is "the distance between the surface flare and the wellhead CMM collection point in the mine because of the potential for the flame to propagate back down to the mine and cause an underground explosion." *Id.*

(Jan. 12, 2001), and provided an exception for temporary road construction associated with coal mining in the North Fork Valley (*see* 36 C.F.R. § 294.43(c)(1)(ix)). *Id.* Both regulatory actions – that is, approval of the lease modifications and USDA's promulgation of the North Fork Exception to the CRR – were legal prerequisites to the 1700-acre lease expansion requested by Mountain Coal.

B. The *West Elk 2* Litigation

In 2013, WildEarth Guardians, Sierra Club, and the High Country Conservation Advocates sought to delay or prevent expanded mining operations by filing an action challenging both decisions, based on six claims of error, three directed at each FEIS. The Court rejected two of the three claims directed at approval of the lease modifications, while sustaining the other four claims of error. In a separate 2014 remedy ruling, the Court entered an order vacating: (i) BLM's 2012 decision approving the lease modifications; (ii) the Service's 2012 consent thereto; and (iii) BLM's 2013 decision approving a coal exploration plan. *High Country Cons. Advocates v. U.S. Forest Serv.*, 67 F. Supp. 3d 1262, 1266-67 (D. Colo. 2014). The Court also vacated the CRR in part. *Id.* at 1267 (setting aside the North Fork Exception in 36 C.F.R. § 294.43(c)(1)(ix)).

In 2015, Mountain Coal re-applied to BLM for the two lease modifications. FSLeasingII-0027395–99, 0027408–09.[2] In addition, the company resubmitted its

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[2] Administrative record citations in this memorandum with either an "FSLeasing" prefix, a "CRR" prefix, or a "BLM" prefix, are from the administrative record in *West Elk 3*, No. 1:17-cv-3025-PAB. In their August 21, 2019 Notice of Lodging the Administrative Record in this case, Federal Respondents stated that, by "consent of the parties, the [*West Elk 3*] record, which is voluminous, was not served anew on the parties and is not being lodged with the Court today." ECF No. 27 at 2. Instead, Federal Respondents explained

exploration plan. FSLeasingII-0018760-61. Mountain Coal's objective was to develop the high-quality coal reserves, which were characterized by low sulfur dioxide emissions, high BTU, low-ash, and low-moisture content, and ensure that these resources are not bypassed. BLM shares the latter concern, as it is required by law to endeavor to achieve maximum economic recovery ("MER") in approving resource recovery and protection plans ("R2P2s"). *See* 43 C.F.R. § 3482.2(a)(2) ("No [R2P2] or modification thereto shall be approved which is not . . . found to achieve MER of the Federal coal . . ."); *see also* 30 U.S.C. § 202a(l) (in approving consolidation of multiple coal leases into a logical mining unit under an R2P2, BLM must ensure that the plan is designed to achieve MER); 43 C.F.R. § 3480.0-5(a)(21) (defining MER).

C. Supplemental NEPA Analysis, 2015 to 2017

In response to Mountain Coal's applications, the USDA and the Service, in cooperation with BLM and OSMRE, undertook preparation of two separate supplemental EISs to address the legal errors found in *West Elk 2* and to support possible reissuance of the vacated decisions. In August 2017, following a formal three-year public NEPA process, the agencies published a supplemental EIS (the "Leasing SFEIS"). The Leasing SFEIS considered the impacts of a decision approving the lease modifications and addressed deficiencies found in *West Elk 2*. In particular, it provided a qualitative analysis of the climate impacts associated with greenhouse gas ("GHG") emissions, within the context of the lease modifications, and it quantified GHG emissions, an

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that after merits briefing concludes, they will "promptly lodge with the Court only those documents from the [*West Elk 3*] record actually cited in briefing." *Id*.

approach recently sustained by this Court in *Citizens for a Healthy Community v. U.S. Bureau of Land Mgmt.*, 377 F.Supp.3d 1223, 1239 (D. Colo. 2019) (finding that BLM took an "appropriately hard look at cumulative climate change impact"). The Leasing SFEIS also considered impacts of the exploration plan on recreation, a deficiency noted in in *West Elk 2*. On December 15, 2017, following Forest Service consent, FSLeasingII-0000045, BLM approved the lease modifications and an "on-lease exploration plan." BLM000001.

With respect to the vacated North Fork Exception to the CRR, 36 C.F.R. § 294.43(c)(1)(ix) , the USDA undertook preparation of a supplemental EIS to support possible reinstatement of the exception. This led to publication of a supplemental EIS which Federal Respondents refer to as the "CRR SFEIS." CRR2-0000001-366. The USDA published the reinstated programmatic rule in the Federal Register in December 2016 and it became effective April 17, 2017. *See* 36 C.F.R. § 294.43; 81 Fed. Reg. 91,811 (Dec. 19, 2016).

D. *West Elk 3*

On December 15, 2017, the same coalition of conservation groups that brings this action brought suit in the District of Colorado challenging approval of the leasing modifications, the on-lease exploration plan, and reinstatement of the North Fork Exception to the CRR. *High Country Conservation Advocates v. U.S. Forest Serv.*, No. 1:17-cv-3025-PAB (Dec.15, 2017) ("*West Elk 3*"). Two days later, petitioners moved to temporarily enjoin exploration activities, *West Elk 3*, ECF No. 8, but the Court denied the motion following oral argument on December 21, 2017. *West Elk 3*, ECF No. 26, at 2.

Merits briefing ensued and the Court, on August 10, 2018, affirmed the agencies' decisions and entered judgment in favor of all defendants. *West Elk 3*, ECF No. 62, at 41.

Among other things, the Court sustained the agencies' NEPA alternatives analysis and its reasons for eliminating a "mandatory methane flaring" alternative from "detailed consideration" under 40 C.F.R. § 1502.14(a), a NEPA-implementing regulation that requires agencies, in certain circumstances, to explain their reasons for eliminating alternatives from full study. The *West Elk 3* Court credited the agencies' explanation that, even if methane flaring could be shown to be economically feasible, "detailed consideration of whether [it] should be used . . . would be more appropriate at a later date because it 'requires detailed engineering and economic considerations' available at later stages in the process . . . ." *West Elk 3*, 333 F. Supp. 3d at 1126. As discussed below, pursuant to lease terms, Mountain Coal submitted an updated analysis in 2018 discussing the engineering and economic considerations of methane flaring at the mine. OSMRE and BLM have since considered that analysis and determined that flaring is *not* economically feasible.

E. State Permitting and the Mining Plan Modification

In March 2018, while the *West Elk 3* litigation was pending, Mountain Coal pursued acquisition of a mining permit from CDRMS, the approved regulatory authority under SMCRA and the State-Federal cooperative agreement at 30 C.F.R. § 906.30. Specifically, Mountain Coal submitted a "Permit Application Package" requesting "Permit Revision 15." AR15. CDRMS staff reviewed the application package to ensure it complied with permitting requirements and that proposed operations would meet

Colorado's performance standards. The agency determined on April 5, 2018 that the application package was "administratively compete," notified OSMRE accordingly, and commenced its permit review process. AR18. On September 4, 2018, CDRMS approved Permit Revision 15. AR4354.

Six months later, on March 12, 2019, OSMRE's Western Regional office in Denver, Colorado, completed its review. The Western Regional Director issued a memorandum recommending to the OSMRE Acting Director in Washington, D.C., that the mining plan modification be approved. AR5. On the same day, the Western Regional Director issued a Record of Decision, adopting the 2017 Leasing SFEIS. AR 14-37. The Western Region also completed a NEPA Adequacy Review Form, AR38-44, which found proposed operations under Permit Revision 15 to be "substantially similar" to those considered in the Leasing SFEIS. The Western Region concluded that the previously-completed analysis of the Leasing SFEIS satisfied OSMRE's NEPA obligations in connection with approving the mining plan modification. AR42.

On March 15, 2019, the Acting Director of OSMRE, having received and reviewed the Western Region's recommendation, in turn recommended to the Assistant Secretary for Land and Minerals Management that the mining plan modification be approved. AR4. On April 19, 2019, the Assistant Secretary approved the mining plan modification. AR1.

STANDARD OF REVIEW

Under the judicial review provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701–706, the Court must decide whether the agency's actions

challenged by Plaintiffs were arbitrary and capricious. *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 763 (2004); *New Mexico*, 565 F.3d at 704–05. A plaintiff proceeding under this standard has the burden of proof. *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976); *Wyoming*, 661 F.3d at 1227.

In conducting its review, the Court "must determine whether the [agency]: (1) acted within the scope of [its] authority, (2) complied with prescribed procedures, and (3) took action that was neither arbitrary and capricious, nor an abuse of discretion." *Wyoming*, 661 F.3d at 1227 (citation omitted).

> Agency action is arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or if the agency action is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Id. (internal quotation marks and citations omitted).

Because this Court is reviewing a decision within the agencies' technical and scientific expertise, the Court's deference to the agencies' decisions is "especially strong." *Id.* at 1246 (citations omitted); *accord Utah Envtl. Cong. v. Bosworth*, 443 F.3d 732, 739 (10th Cir. 2006). The Court's role is to ensure that the agencies reached a rational conclusion, and "not to substitute [its] judgment for that of the agency." *Colo. Wild v. U.S. Forest Serv*., 435 F.3d 1204, 1213 (10th Cir. 2006) (citation omitted).

ARGUMENT

Petitioners allege that approval of the mining plan modification is unlawful because (i) the agency failed to consider a mandatory flaring alternative to reduce GHG

emissions; (ii) failed to consider cumulative impacts on global climate; and (iii) failed to consider updated information on impacts to water resources. Mem. at 15-17 (summarizing the contentions). All three claims lack merit, as explained below.

As a preliminary matter, however, Federal Respondents note that Petitioners' first and second arguments are directed at the adequacy of the Leasing SFEIS, which was challenged and sustained in *West Elk 3*. The doctrine of res judicata, which encompasses issue preclusion, *see Taylor v. Sturgell*, 553 U.S. 880, 892 (2008), prevents a party from litigating a claim "that was or could have been the subject of a previously issued final judgment." *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 847 F.3d 1221, 1239 (10th Cir. 2017) (quoting *MACTEC, Inc. v. Gorelick*, 427 F.3d 821, 831 (10th Cir. 2005)). *Stone v. Dep't of Aviation*, 453 F.3d 1271, 1275 (10th Cir. 2006) (citation omitted) ("a party who once has had a chance to litigate a claim before an appropriate tribunal usually ought not have another chance to do so").

Res judicata requires the existence of three elements: "(1) a [final] judgment on the merits in an earlier action; (2) identity of parties or privies in the two suits; and (3) identity of the cause of action in both suits." *King v. Union Oil Co. of Cal.*, 117 F.3d 443, 445 (10th Cir. 1997). Element (1) is satisfied because a final judgment was entered in *West Elk 3*. Element (2) is satisfied because all five Petitioners in this case were petitioners in *West Elk 3*. And element (3) is satisfied because, in each case, Petitioners' challenge is directed at inadequacies in the 2017 Leasing SFEIS. While it is true Petitioners are challenging a different agency action – approval of a mining plan modification not a lease modification – they argue in both instances that the agency erred

because the Leasing SFEIS was inadequate. In other words, their fundamental contention – inadequacy of the Leasing SFEIS – was in fact "the subject of a previously issued final judgment." *Lenox MacLaren Surgical Corp.*, 847 F.3d at 1239. Issue preclusion bars "successive litigation of (1) an issue of fact or law (2) actually litigated and resolved in a valid court determination (3) essential to the prior judgment, *even if the issue recurs in the context of a different claim*." *In re Zwanziger*, 741 F.3d 74, 77 (10th Cir. 2014) (citing *Taylor*, 553 U.S. at 892) (emphasis added). Petitioners had every opportunity in *West Elk 3* to demonstrate that the Leasing SFEIS was inadequate and did not succeed. Simple fairness dictates that Petitioners not be allowed to contend again that the Leasing SFEIS is inadequate.

1. Interior Considered a Reasonable Range of Alternatives

Petitioners argue OSMRE violated NEPA in recommending approval of the mining plan modification without considering a "mandatory methane flaring" alternative. Mem. 17-27. As explained herein, Petitioners' contentions that flaring is a reasonable alternative and that OSMRE misrepresented the conclusions of the Leasing SFEIS (regarding the technical and economic feasibility of flaring) lack merit and are contradicted by the record. An agency need not examine alternatives that do not accomplish the purpose or objective of a proposed action, as such alternatives are "not reasonable." *Wyoming*, 661 F.3d at 1244 (citation and internal quotation marks omitted). As discussed below, flaring raises safety concerns for mine workers as well as for forest resources, and there is uncertainty as to its effectiveness. There is also uncertainty as to whether the Mine Safety and Health Administration ("MSHA") would approve a flaring

proposal. It is therefore not reasonable for the agencies to embrace an alternative that they could not say, with any confidence, was feasible or realistic.

The Court should sustain OSMRE's decision to proceed based on the alternatives studied in the Leasing SFEIS because the record demonstrates methane flaring is not reasonable. The Leasing SFEIS considered methane flaring in a section entitled "Alternatives Considered but Eliminated from Detailed Study," AR260, prepared in compliance with 40 C.F.R. § 1502.14(a), which requires agencies to "briefly discuss" the reasons for eliminating alternatives from detailed study.[3]

In discussing the decision to eliminate flaring from detailed study, the Leasing SFEIS considered and disclosed the benefits of flaring, in terms of reducing GHGs released into the atmosphere, noting likely reductions of 87% (on a CO_2-equivalent basis). AR268. It also noted the availability on the market of portable flares, which would be suitable at a site such as the West Elk mine with multiple methane drainage wells, but explained their effectiveness is uncertain, given that a flare "may need to be supplemented with fuel to achieve complete combustion of the [methane] gas when required gas volume conditions do not meet the minimum requirements," AR268-69, considerations which would increase costs and implicate additional safety and logistical concerns. Further, the coal seam in the Lease modification tracts underlies a layer of overburden that is not as deep as the overburden at the existing mine and, as a result, it

[3] The agencies addressed the issue in the Leasing SFEIS because the conservation groups, as they did in 2008, again urged flaring or capture (in comments on the supplemental FEIS for the roadless rule), CRR2-0105833, presenting essentially the same evidence that the agencies had rejected in *West Elk 1*.

produces less methane, due to its proximity to the surface. ECF No. 29 at 11 (Brief on the Merits of Intervenor-Respondent Mountain Coal). In addition, the mine has improved its methane-control practices by using a new "bleederless" progressive sealing system, thereby reducing methane emissions by nearly 90%. *Id.* (citing AR81). These differences make flaring even less practical and increase the likelihood of that fuel supplementation would be required to achieve full combustion of methane.

The Leasing SFEIS also addressed the risks of flaring. Coal is formed over millions of years by decaying plant material that is converted by microbiologic processes into peat and, over time, buried by sedimentary deposits. AR530 (Appendix A to Leasing SFEIS). This "coalification" process also creates methane gas, which is stored in the porous coal, as well as in surrounding rock strata. *Id.* Mining activity, such as excavation of rock strata and overburden and coal extraction itself, "redistributes established stratigraphic pressures by removing coal and fracturing both the remaining coal and surrounding rock strata, thereby releasing the methane." AR262; *see also* AR531 (discussing methane release).

Coal mine methane – which consists primarily of methane (CH_4) and also of much lesser amounts of ethane (C_2H_6), oxygen, nitrogen, and carbon dioxide – presents a significant hazard to miners, due to its toxicity. AR531. More importantly, at air concentrations between 5% and 15% by volume, methane is explosive. *Id.* Each of these considerations presents a very real safety concern at the mine because West Elk coal in particular is highly volatile and prone to spontaneous combustion. AR80. Further, fire safety is a paramount consideration on any national forest. This is why the agencies

emphasized in the Leasing SFEIS that any flaring option considered in the future for mitigation purposes would need to account for fire risk, consistent with the lease stipulation in Table 2-1. AR244 (stating that if "flaring or other combustion is prescribed as part of any future mitigation measure, lessee will be required to submit a fire prevention and protection plan" for approval by a responsible Forest Service official").[4]

While recognizing that the use of flaring systems is not prohibited, the Leasing SFEIS advised that a flaring plan would have to be approved by MSHA, "which has the regulatory authority to approve proposed flaring systems intended for use at coal mines in the U.S." AR269. The Leasing SFEIS also noted that MSHA would have to examine the proposal in order to "establish the requirements for the system to ensure underground miner safety." *Id.* To date, the agencies explained, "MSHA has not approved or disapproved any flaring proposals because it has never been presented with an application." *Id.* The agencies did, however, acknowledge that flaring had been used in a degasification system at an underground trona mine near Green River, Wyoming, but

[4] OSMRE considered this analysis, which Petitioners do not challenge, and explained in the ROD that it "understands the environmental benefit that would result from this mitigation." AR 35 (referring to the fact that flaring could potentially reduce the total global warming potential of the gas by approximately 87%). However, as the ROD also explained, "the issues that remain regarding methane mitigation are not environmental in scope and thus do not require additional environmental analysis." *Id.* Rather, the remaining issues "are the technical and economic feasibility of the [flaring] process and miner safety." AR35. Thus, the ROD confirms, as to OSMRE, what the Court observed in *West Elk 3,* as to BLM and the Service, that is, that the agencies considered the environmental impacts of methane venting. 333 F.Supp.3d at 1126. OSMRE should not be required to supplement the Leasing FSEIS with a non-environmental analysis.

they pointed to an important distinction: trona is not combustible, but coal is. *Id.* Thus, the safety considerations are quite different.

Importantly, OSMRE's decision to forgo detailed consideration of a methane flaring alternative is not based on the Leasing SFEIS alone. Soon after the December 21, 2017 ruling in *West Elk 3* denying emergency injunctive relief, Mountain Coal commenced exploratory work on the newly-acquired tracts for the first time. Only through this exploration work did Mountain Coal acquire the data necessary for the company, through its expert consultant Tetra Tech, to prepare an updated "Methane Management Alternatives Alternatives Evaluation" report, AR67 (Nov. 19, 2018). This document was required by the lease stipulation in Table 2-2 of the Leasing SFEIS. AR247.

Notably, in *West Elk 3*, in rejecting Petitioners' claim that the agencies should have considered a methane flaring alternative in the Leasing SFEIS, the Court pointed to these lease stipulations, noting that they "require additional analysis" of the feasibility of methane use or capture, in particular, periodic reporting on "changing technical and economic parameters that can either enable or create barriers to the implementation or adoption of a particular methane control strategy." *West Elk 3*, 333 F. Supp. 3d at 1124 (also noting the statement in the Service's 2017 record of decision that methane flaring was not considered in detail because flaring, "like all other methane mitigation measures, requires detailed engineering and economic considerations that would occur later in the process," meaning after exploration work was undertaken on the tracts and necessary data

acquired).[5] OSMRE appropriately considered this more recent report, in addition to the Leasing SFEIS, in its consideration of a possible methane flaring alternative.

The 2018 updated report concluded that – given the high cost of building and operating a flaring system, and the fact that flaring is "still not technically viable," due to low concentrations of methane in ventilated mine air – "none of the alternatives reviewed are currently considered to be economically viable." AR68. In its ROD, OSMRE explained that the 2018 updated report was submitted to BLM, the leasing authority; that BLM reviewed the report (*see, e.g.,* AR45-50), and provided a summary to OSMRE; that OSMRE reviewed the summary; and that OSMRE also "independently reviewed and found no new information or significant changes to existing information that would warrant this alternative or mitigation to be carried forward at this time." AR35.

The 2018 updated report also examined the Raven Ridge report, AR3272, on which Petitioners rely in arguing that methane flaring can be done safely and economically. Mem. 18. The report observed that Raven Ridge had overestimated methane emissions by at least a factor of two and had underestimated operating and maintenance costs by almost one-half. AR96-97. For all these reasons, Petitioners' charge of uninformed decision making, Mem. At 15, is belied by the record.

[5] The Court also credited the agencies' comment response stating that "methane flaring was not considered as an alternative because there are no legal limits on methane emissions and 'it would be arbitrary to mandate its control when effectiveness of the mitigation is only measured in tons of CO2e and not by effects on either surface or non-mineral resources." Id.

Petitioners' opening brief takes exception with the ROD's statement that OSMRE "agree[s] with USFS and the BLM's determination that this alternative is not technically or economically feasible (SFEIS Section 2.3.7.5)," AR35, a statement that appeared in the topic sentence of OSMRE's explanation of its view on methane flaring. Petitioners argue the Leasing SFEIS did not make such a finding and claim this shows Interior has engaged in a "shell game." Mem. 26. Petitioners are correct that the Service and BLM did not make this finding, but it bears mention that Section 2.3.7.5 of the Leasing SFEIS, the section referred to in the sentence Petitioners criticize, is the agencies' explanation as to why certain alternatives were eliminated from detailed study. That section explains why the Service and BLM declined to formally consider a flaring alternative due to the uncertainties and technical impediments discussed above. While it is true the agencies did not make the noted statement, they provided strong reasons why including flaring as a formal alternative was not appropriate. The rationale underlying the agencies' decision to eliminate flaring from detailed study – that is, its unreasonableness as an alternative – is in complete harmony with the rationale supporting OSMRE's decision not to undertake further NEPA analysis to consider a flaring alternative.

As the Court did in West Elk 3, it should again sustain the agency's decision in regard to flaring. OSMRE participated in the development of the Leasing SFEIS as a cooperating agency and formally adopted the statement in its Record of Decision ("ROD"). AR14. The agency also properly considered the more recent 2018 report, which provided the additional data required by the Leasing SFEIS's lease stipulations. The ROD explains OSMRE's reasons for declining to consider a mandatory flaring

alternative at the mining plan approval stage, AR35, and addresses various other concerns raised by three Petitioners in a June 1, 2018 letter to OSMRE. AR3316.

In sum, OSMRE's conclusion is reasoned and supported by record evidence. The technical judgments the agency has exercised in assessing the appropriateness of methane flaring are entitled to deference, even if Petitioners' experts disagree. *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 103 (1983) (scientific determinations in the agency's area of special expertise, as opposed to simple findings of fact, generally require the reviewing court to be at its most deferential); accord *Wyoming*, 661 F.3d at 1246.

For all these reasons, the Court should reject Petitioners' claim that NEPA demands consideration of a mandatory flaring alternative.

2. OSMRE Appropriately Considered Cumulative Climate Impacts

Petitioners contend OSMRE failed to properly study cumulative climate impacts and cannot rely on the Leasing SFEIS because it did not adequately study the issue. As such, Petitioners plainly seek to re-litigate their claim in *West Elk 3* that the Leasing SFEIS is inadequate in its study of climate impacts. *See West Elk 3*, ECF No. 40, at 26 (arguing, in *West Elk 3*, that the Leasing SFEIS "discusses the regional and global impacts of climate change generally without attributing any impacts to the Lease Modifications"). Now Petitioners challenge the Leasing SFEIS for not quantifying the cumulative impact of mine expansion "in light of the overall emissions from other federal coal mining approved by or pending before [Interior] and OSM." Mem. at 31. The argument is not based on any new information or any procedural developments since the *West Elk 3* ruling nor is it directed at anything OSMRE did, but instead assails only the

Leasing SFEIS. It is thus clear that the issue Petitioners are raising, concerning the adequacy of the discussion of climate impacts, was in fact "the subject of a previously issued final judgment.'" *Lenox MacLaren Surgical Corp.*, 847 F.3d at 1239. There is no reason Petitioners could not have raised the issue previously and the Court should order it precluded.

In addition, Petitioners have waived their claim that the agencies' analysis of cumulative climate impacts should have focused on coal mining approved by Interior and OSMRE. The Supreme Court has made clear that a plaintiff must "structure [its] participation" in administrative proceedings in a manner that "alerts the agency to [its] position and contentions, in order to allow the agency to give the issue meaningful consideration." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 764 (2004). It is also necessary that a plaintiff must raise his or her contentions at the "time appropriate" for such input "under [the agency's] practice." *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952); *accord Silverton Snowmobile Club v. U.S. Forest Serv.*, 433 F.3d 772, 783 (10th Cir. 2006). Here the appropriate time would have been during the public comment period on the draft supplemental EIS, prepared following the decision of *West Elk 2*. Although Petitioners submitted timely comments on the draft supplemental EIS, FSLeasingII 0049115 (July 24, 2016 letter), the letter did not raise the specific cumulative impacts contention asserted in this litigation, even though the law is clear that such contentions must be presented "in sufficient detail to allow the agency to rectify the alleged violation." *Forest Guardians v. U.S. Forest Serv.*, 641 F.3d 423, 430 (10th Cir. 2011).

Even if the Court concludes the claim is viable, it should be rejected because the Leasing SFEIS adequately considered climate impacts and, further, the specific form of cumulative impacts analysis Petitioners insist on is not required by NEPA. NEPA's implementing regulations, 40 C.F.R. § 1508.7 (2018), define cumulative impacts as the

> impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.

Id. Petitioners contend that the Leasing SFEIS should have assessed the cumulative impacts of expected GHG emissions "when added to other past, present, and reasonably foreseeable *federal coal mining projects*." Mem. 30 (emphasis added). Petitioners therefore seek an analysis that is not, in fact, cumulative, as it represents only a narrow slice of the overall picture, confining the scope of OSMRE's GHG assessment to federal coal projects while ignoring other sources of GHG emissions, and other sectors of the economy, as well as actions by other entities, such as states, counties, Tribal agencies, and private individuals.

It defies logic to suggest that this artificial glimpse would be more helpful to decision makers and the public than the approach USFS and BLM actually took in assessing cumulative climate impacts, which was to provide a qualitative analysis of climate change, explain the role of GHGs in producing climate impacts, and assess project emissions as a percentage of U.S. GHG emissions. AR322-39; *see also* AR 337 (noting that "0.22% of the U.S. total relative to 2014, and 0.04% of the global GHG burden relative to 2013 on an annualized basis"). This Court recently sustained a very

similar analysis in *Citizens for a Healthy Community v. U.S. Bureau of Land Management*.

In *Citizens for a Healthy Community*, the Court credited BLM's argument that the global nature of climate change does not lend itself to a traditional cumulative impacts analysis, in which the agency identifies a geographic area where project impacts would be felt. 377 F. Supp. 3d at 1238 (declining to second-guess the agency's choice of methodology). The government had contended that, in the case of GHG emissions, the the relevant geographic area is the entire world, which makes traditional cumulative impacts analysis an impossibility. The same analysis applies here: rather than artificially limiting the scope of its analysis to "federal coal mining projects," OSMRE properly considered GHG emissions worldwide.

The approach employed by the agencies here and in *Citizens for a Healthy Community* is consistent with guidance issued in 2016 by the Council on Environmental Quality (*see* Aug. 1, 2016 Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews, 81 Fed. Reg. 51,866 (Aug. 5, 2016)), and with draft guidance issued in 2019, *see* Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions, 84 Fed. Reg. 30097 (June 26, 2019).

The 2016 guidance counseled agencies to use GHG emissions as a proxy for assessing potential climate change impacts and to quantify a project's direct and indirect GHG emissions. 81 Fed. Reg. 51,866 at 51,866. The 2019 guidance, if finalized, would

encourage agencies, where GHG inventory information is available, to reference local, national, or sector-wide emission estimates "to provide context for understanding the relative magnitude of a proposed action's GHG emissions, and to include a "qualitative summary discussion of the effects of GHG emissions." 84 Fed. Reg. 30,097 at 30,098. While these guidance documents are not binding, their reasoning corroborates the agencies' choices here. Other courts have sustained similar approaches. *See W. Org. of Res. Councils v. U.S. Bureau of Land Mgmt.*, No. CV 16-21-GF-BMM, 2018 WL 1475470, at *13-14 (D. Mont. Mar. 26, 2018) (approving use of GHG emissions as proxy for global climate change); *WildEarth Guardians v. Jewell*, No. 1:16-CV-00605-RJ, 2017 WL 3442922, at *12 (D.N.M. Feb. 16, 2017) (sustaining an analysis that calculated total project CO_2 emissions and analyzed them "in the context of annual global and national emission level"). Accordingly, the Court should adopt the reasoning of these cases and reject Petitioners' claim of error in the agencies' consideration of cumulative climate impacts.

3. OSMRE did not Err in Proceeding based on the Leasing SFEIS's Analysis of Water Resources.

Petitioners also contend OSMRE inadequately considered impacts to water resources, but their claim is contradicted by the record. In particular, Petitioners argue NEPA was violated "when [OSMRE] identified the presence of perennial waters in the project area and acknowledged these resources could be affected by coal mining, but then failed to analyze mining's impacts on these waters." Mem. 32. Specifically, they call into question certain passages in a NEPA Adequacy Review Form ("Review Form"), AR

000038, the document which memorialized OSMRE's determination that the effects of the mining plan, as developed by CDRMS and Mountain Coal in Permit Revision 15, were "substantially similar to that analyzed in the [Leasing] SFEIS and the environmental analysis completed in the [Leasing] SFEIS is adequate." AR38.

In reaching this conclusion, OSMRE reviewed the 2016 Annual Hydrology Report, AR1490, the latest in a series of annual reports on "hydrologic monitoring activities" and associated data, AR 1493, which Mountain Coal must submit every year to CDRMS in accord with permit terms. The 2016 Report was the most recent annual report available post-dating the annual reports considered in the Leasing SFEIS, and OSMRE properly reviewed it and compared it to the Leasing SFEIS. It did so for the purpose of ensuring that Permit Revision 15, as received from CDRMS, did not present "any new environmental impacts or require additional mitigation measures that were not previously analyzed in the [Leasing] SFEIS." AR 41. Thus, what is actually an example of thorough regulatory oversight is mischaracterized by Petitioners as a violation of law.

Specifically, Petitioners challenge a passage in the Review Form where OSMRE noted several minor edits intended to correct ambiguous language in the Leasing SFEIS. For example, the Leasing SFEIS stated that

> about 11.3 miles of tributary streams drain the lease modification areas and most flow only intermittently. Lease 1362 has about 0.27 miles of perennial stream and 5.58 miles of intermittent channels. Lease 67232 has about 0.31 miles of perennial stream and 5.17 miles of intermittent channels.

AR361. On the same page, the Leasing SFEIS stated:

> South Prong Creek and Horse Creek, as reported by MCC data, are *ephemeral* and flow only in response to spring runoff conditions and storm

> events. Perennial and intermittent streams in the lease modifications area are shown on Figure 3-20.

Id. (emphasis added).

On Figure 3-20, AR363, perennial streams are depicted by a solid blue line and intermittent streams are depicted by a dashed blue line. An examination of Figure 3-20 reveals that South Prong Creek is in fact perennial *and* intermittent, in different reaches, despite what the text of the Leasing SFEIS stated. For this reason, OSMRE provided correcting language in the Review Form, appropriately reflecting, *consistent with* Figure 3-20, that "South Prong Creek [is] perennial and intermittent." AR43. Thus there are no "new findings" that would require "a new analysis of impacts." Mem. at 33. Notably, Petitioners cite no authority for their conclusion that "[mere] re-naming of stream classifications" amounts to a NEPA violation. Nor do they indicate why the textual adjustment in the Review Form rises to the level of "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts" (within the meaning of 40 C.F.R. § 1502.9), such as would require supplementation of the Leasing SFEIS. The Supreme Court has made clear that "an agency need not supplement an EIS every time new information comes to light after the EIS is finalized." *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 373 (1989). Application of the "rule of reason," the Court explained, turns on "the value of the new information to the still pending decisionmaking process." *Id*. at 374.

> If there remains "major Federal actio[n]" to occur, and if the new information is sufficient to show that the remaining action will "affec[t] the quality of the human environment" in a significant

> manner or to a significant extent not already considered, a supplemental EIS must be prepared.

Id. Petitioners' showing falls short of the *Marsh* standard, as they make no attempt to demonstrate that the allegedly new information affects the environment "in a significant manner or to a significant extent not already considered." *Id*.

Similarly, OSMRE clarified in the review form that because there are "perennial reaches of South Prong Creek and Horse Creek within the lease modification area" – referring to the west-central portion of tract COC-1362 (i.e., South Prong Creek) and the west-central portion tract COC-67232 (i.e., Horse Creek), where solid blue lines can be seen – "it is likely there are perennial springs associated with these reaches." AR43. However, this is not to say that, in fact, there are perennial springs. Thus the statement in the Leasing SFEIS that "there are no *known* perennial springs," AR364 (emphasis added), remains true.

Notably, the perennial streams depicted on Figure 3-20 lie mostly in the western half of the map, while the intermittent streams lie mostly to the east, where the contour lines within tract COC-67232 reflect that the terrain rises to the east, in the direction of Mount Gunnison. This comports with a general understanding of natural processes that the perennial reaches would be located at the lower elevations, and further that a cause for the perennial characteristics could be perennial springs. But this is not based on new data derived from the Hydrology Report. It is an inference drawn from observation of stream conditions on the westerly downslope of Mount Gunnison, long known to the agency and depicted on multiple maps in the Leasing SFEIS. *See* Figure 1-2, AR217;

Figure 2-2, AR253; Figure 2-3, AR259; Figure 3-20, AR363. The Court should decline Petitioners invitation to flyspeck the analysis. *New Mexico*, 565 F.3d at 704 (deficiencies that are mere "'flyspecks' and do not defeat NEPA's goals of informed decisionmaking and informed public comment will not lead to reversal.").

In sum, the record demonstrates that all three agencies, OSMRE, BLM and the Service, carefully considered impacts to water resources, in a thorough fifteen-page analysis. AR361-76. The analysis identified water resources and discussed surface water hydrology and water quality. AR361. It examined the impacts of past mining on surface water and explained that monitoring in the Gunnison River, downstream of the mine, "shows little impact to the water quality from current or historical mining." AR362. The Leasing SFEIS explained that subsidence impacts "have been observed" in areas where the overburden is less than 500 feet thick, including cracks in weathered bedrock, but that "no cracks [were] observed in saturated alluvium underlying these streams" and there was "no evidence of loss of flow observed." *Id*. Leasing SFEIS also examined impacts to groundwater resources, which are limited. AR 364. The Leasing SFEIS indicates that groundwater which surfaces as springs and seeps is associated with "shallow alluvial [or] colluvial deposits" associated with streams, and that they do not appear to be hydrologically connected to "deeper bedrock aquifers." *Id*. In light of this thorough analysis and the fact that the claimed new information is actually not new (which demonstrates that Petitioners' claim is actually an improper collateral attack on the Leasing SFEIS), the Court should reject Petitioners' contentions.

4. Remedy

Should the Court find error, Federal Respondents request the opportunity for remedy briefing, as occurred in *West Elk 2*. Otherwise, they respectfully request that any remedy order entered do no more than remand OSMRE's decision, without vacatur, for completion of corrective NEPA analysis.

While the APA provides that "[t]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), this Court has recognized that courts "retain equitable discretion to fashion an appropriate remedy, and in some cases equitable principles counsel in favor of remand without vacatur." *Diné Citizens Against Ruining Our Env't v. U.S. Office of Surface Mining Reclamation & Enf't*, No. 12-cv-01275-JLK, 2015 WL 1593995, at *1 (D. Colo. April 6, 2016) (Kane, J.); *accord* 5 U.S.C. § 702 ("[n]othing herein . . . affects . . . the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground"). Rather, "when equity demands," the challenged agency action can be "'left in place while the agency follows the necessary procedures' to correct its action." *Cal. Cmtys. Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012) (quoting *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995)).

A remand without vacatur would be appropriate here because no longwall mining, the real source of Petitioners' alleged harm, is likely until the first quarter of 2020. ECF No. 29 at 33. Consequently, there is time for corrective NEPA analysis. An order of vacatur could disrupt mining activity for an extended period of time, and this in turn

could adversely impact employment and investment opportunities in the North Fork Valley, as well as tax and royalty revenue to Colorado and the United States. The Court should therefore follow the course it took on remedy in the Colowyo mining plan challenge. *See WildEarth Guardians v. United States Office of Surface Mining, Reclamation & Enf't*, 104 F. Supp. 3d 1208, 1232 (D. Colo. 2015), order vacated, appeal dismissed, 652 F. App'x 717 (10th Cir. 2016). There the Court found "the benefits of immediate vacatur [did] not outweigh the potential harms" and allowed the agency a period of time to complete corrective NEPA, while deferring vacatur pending timely compliance. The same path is appropriate here, should the Court find fault with OSMRE's NEPA analysis.

CONCLUSION

Accordingly, Federal Defendants respectfully request that the Court deny the petition for review of agency action and enter judgment in favor of all Defendants.

Respectfully submitted this 6th day of September, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2019, a copy of the foregoing notice was served by electronic means on all counsel of record by the Court's CM/ECF system.

/s/ *John S. Most*

JOHN S. MOST